sel further contended that judgment debtor's allegation of negotiations and ulterior motive were insufficient reason for the court to embark on an enquiry into the consideration behind the judgment.

The court after considering the authorities and the circumstances leading to the "in default judgment" and the subsequent conduct of the parties after the judgment did not feel disposed to enquire into the judgment. There was no allegation of fraud, collusion or miscarriage of justice. It was a regular judgment. The judgment in default of defence was entered on May 8, 1984. The judgment debtor was represented by M/s. Ansari & Co., who had filed appearance on October 20, 1983. If as what had been stated by the judgment debtor was true that in early November 1983 the judgment creditors gave an undertaking that they would not proceed with the above suit pending a negotiated settlement the judgment debtor would have promptly applied to set aside that judgment on being informed of it. But what have we in these proceedings? It is clear from the affidavit of judgment debtor sworn on September 11, 1985, HYL-4, that he accepted the in default judgment and the judgment debtor through his counsel's letter HYL-2 dated September 12, 1984 instead of protesting of the breach of alleged undertaking tried to settle the debt by offering as collateral land title CL03529917. Judgment creditor of course sent this land title for valuation. When negotiations to settle this debt broke down and the judgment debtor could not provide sufficient collateral the judgment creditors by letter dated April 19, 1985, HYL-2, proceeded with the present application. Negotiations were after the judgment.

Judgment creditors' counsel submitted that to permit the judgment debtor to raise the issues which the judgment debtor wanted to raise and to counterclaim for rescission of the guarantee would be scandalous. He cited *Reichel* v. *Magrath*[22] which judgment had the approval of the Federal Court in *Tractors Malaysia Sdn. Bhd.* v. *Charles Au Yong*[23] and which decision following a bankruptcy petition on almost similar facts after a default judgment is binding on this court. In the *Tractors Malaysia case (supra)* the Federal Court in allowing the appeal after the setting aside of the petition by the trial judge held that the essence of the claim of respondent (judgment debtor) did not amount to a counterclaim which he could not have set up in the first action in which the judgment creditor obtained judgment within the meaning of section 3(1)(i) of the Bankruptcy Act, 1967. On the contrary the Federal Court held the judgment debtor there could have set it up if his solicitor wanted to and there was plenty of time between the default judgment and the bankruptcy notice for the judgment debtor there to set aside the judgment in default. Similarly in our present petition it is also clear that the defence and counterclaim that the judgment debtor wished to set up are not the ones which he could not have set up in the action in which the judgment in default of defence was obtained within the meaning of section 3(1)(i) of the Bankruptcy Act, 1967. He was represented by counsel and there was ample time for the judgment debtor to set aside the judgment. He instead through his counsel tried to settle it.

Holding myself bound by the Federal Court decision in *Tractors Malaysia case (supra)*, I cannot find any reason why I should not make the Receiving Order on the estate of the judgment debtor as prayed. I do so now. Petition is so granted with liberty to petitioner to further apply.

*Order accordingly.*

Solicitors: *Jayasuriya Kah & Co.; Ansari Datu Nasrun & Co.*

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## THE GOVERNORS & TRUSTEES OF LADY TEMPLER TUBERCULOSIS HOSPITAL FUND REGISTERED v. RAMPAI MUDA DEVELOPMENT SDN. BHD.

**[O.C.J. (L.C. Vohrah J.) October 2, 1986]**
**[Kuala Lumpur – Civil Suit No. F. 22-241-1986]**

*Contract – Agreement for management of hospital and lease of land – Breaches by defendants – Application for interlocutory injunction and order for vacant possession – Whether should be granted – Factors to be considered – Balance of convenience.*

*Injunction – Application for interlocutory – Factors to be considered – Balance of convenience.*

The subject matter of this case is a hospital, the Lady Templer Hospital, owned by the plaintiffs, who also owned some 51 acres of land on which the Hospital and other buildings were erected. On December 11, 1984, the plaintiffs and the defendants executed an agreement providing, on terms and conditions stated therein, for the transfer of the management of the Hospital and for the lease of the land from the plaintiffs to the defendants for the period commencing on January 1, 1985, and ending on June 18, 2057. The plaintiffs contend that as a result of the defendants committing a breach of the agreement by not paying the rental and rental deposit and by not furnishing the bank guarantee/performance bond, and consequent upon sending

the letter dated February 14, 1985 demanding performance of obligations by the defendants, the agreement had been terminated, thus putting an end to the licence granted to the defendants, to occupy the Hospital. The defendants had been occupying it and the land as trespassers since April 1, 1985, and must quit and deliver up vacant possession. The plaintiffs therefore make the present application for an interlocutory injunction to stop the defendants from carrying on the business of a specialist centre at the Hospital and to compel them to deliver up vacant possession of the Hospital. The defendants filed a defence and counterclaim and opposed the application, denying breaches on their part.

**Held:** (1) the undisputed facts relied on by the plaintiffs to show exceptional circumstances tilt the balance of convenience in their favour;

(2) order in terms of all the prayers granted;

(3) costs of the application would be paid by the defendants.

*Cases referred to:*

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 509.
(2) *Gibb & Co.* v. *Malaysia Building Society Bhd.* [1982] 1 M.L.J. 271.
(3) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chia Ngen Yiok* [1975] 2 M.L.J. 109.
(4) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150.
(5) *T.R. Hamzah & Yeang Sdn. Bhd.* v. *Lazar Sdn. Bhd.* [1985] 2 M.L.J. 45.
(6) *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411.
(7) *Tan Suan Choo* v. *Majlis Perbandaran Pulau Pinang* [1983] 1 M.L.J. 323.
(8) *Manchester Corporation* v. *Connolly & Ors.* [1970] 1 All E.R. 961.

APPLICATION.

*T. Thomas* (*Miss A. Srinivasan* with him) for the plaintiffs.

*Joginder Singh* (*Miss Mohinder Kaur* with him) for the defendants.

*Cur. Adv. Vult.*

**L.C. Vohrah J.**: This is an application by the Governors and Trustees of the Lady Templer Tuberculosis Hospital Fund Registered ("the Trust Corporation") for an interlocutory injunction to stop Rampai Muda Development Sdn. Bhd. ("Rampai Muda") from carrying on the business of a specialist centre at the Lady Templer Hospital ("the Hospital") and to compel Rampai Muda to deliver up vacant possession of the Hospital.

The facts as disclosed by the evidence on affidavit are as follows. The Trust Corporation is the registered proprietor of some 51 acres of land held under a lease for 99 years and the owner of the Hospital and other buildings erected thereon ("the said land"). From the time of its establishment the management of the Hospital was in the hands of the Trust Corporation but the Government of Malaysia made varying degrees of monetary contributions to sustain the running of the Hospital. The Hospital was originally established as a specialized hospital for the treatment of tuberculosis but since 1970 it has actually been run as a general hospital with maternity services. Some time in 1984 the Government indicated that it would cease to subsidise the Hospital with effect from January 1, 1985 and recommended that the Hospital be run as a private hospital to provide services to the public. The Trust Corporation then took steps to invite bids from interested parties in the private sector. A special committee appointed by the Trust Corporation to consider the bids selected Rampai Muda as the successful bidder in August 1984 and in October 1984 Rampai Muda was given permission by the Trust Corporation to enter the said land and the Hospital in order to enable it to familiarize itself with the running and management of the Hospital and to commence renovation works. On December 11, 1984, an agreement in writing was executed by the Trust Corporation and Rampai Muda ("the said agreement"). Clause 1.1 of the said agreement reads:

> "The Trust Corporation has agreed to transfer the management of the Hospital and to lease the Land to the Company for the period commencing on the 1st day of January 1985 to the 18th day of June 2057 and the Company has agreed to take over the management of the Hospital and to accept the lease of the Land upon the terms and conditions herein contained."

Under Clause 2.1 of the said agreement the Trust Corporation had the specific obligation:

1. To apply to the High Court for approval of the leasing of the said land to Rampai Muda and to transfer thereto the management of the Hospital; and

2. To apply to the Ruler-in-Council and other relevant authorities for approval to lease the said land to Rampai Muda for use as a private hospital within the meaning of the Private Hospitals Act, 1971.

Clause 3 of the said agreement stipulates that the said agreement is subject to these approvals being obtained by December 31, 1984, and provides for extension of time in the event that they are not

obtained within time and for termination of the said agreement by either party upon notice being given.

Under Clause 2.2 of the said agreement Rampai Muda was under a specific obligation not to charge its interests in the said land unless certain conditions were fulfilled.

The provisions of Sub-clause 4.1 of the said agreement which form the basis of the Trust Corporation's action read:

"Takeover Date shall be the 1st day of January 1985.
Until the necessary approvals referred to in Clause 3 have been duly obtained and subject to the provisions of Clause 3 hereinabove mentioned, it is hereby mutually agreed that with effect from the Takeover Date the Company shall pay the rent reserved by the Lease and shall provide the Trust Corporation with the Bank Guarantee referred to in sub-clause 4.2(c) hereof and shall take possession of and occupy the demised premises referred to in the Lease as the licensee of the Trust Corporation on the same terms and conditions as those contained in the Lease in so far as they are applicable to the Company being on the land as licensee only. This situation shall continue until either this Agreement is terminated or the Lease is duly executed and registered."

Sub-clause 4.2(c) reads:

"If the Company had not already done so pursuant to Clause 4.1 the Company shall provide the Trust Corporation with a Bank Guarantee/Performance Bond to the value of Ringgit Two Million and Five Hundred Thousand (M$2,500,000.00) only as security for the due performance on the part of the Company to protect the Trust Corporation in the event that the Company abandons or is unable to continue with the management of the Hospital. The said Bank Guarantee/Performance Bond shall be renewed and/or revised annually until such time as the Trust Corporation shall consider that the Company's operations is sufficient to cover the Hospital's expenditure."

The terms and conditions contained in the Lease which are applicable appear in Sub-clauses 4.(1) and 4.(8) which read:

"On the execution of this Lease the Lessees shall pay the Lessors a sum equivalent to six (6) months rental amounting to Ringgit Four hundred and sixty thousand ($460,000/-) as security for the due observance and performance of the stipulations terms and conditions of the Lease and the same together with the respective sums paid pursuant to subclause (2) of this Clause hereinbelow shall be refunded to the Lessees at the expiration of the term of the lease less such sum or sums as may be due to the Lessors by virtue of the non-observance of the stipulations terms and conditions of the Lessees herein contained."
[Sub-clause 4(1)]

"The rental for the period commencing 1.1.1985 – 31.12. 1987 is Ringgit Seventy six thousand six hundred and sixty six and cents sixty seven ($76,666.67) per month and the Lessees shall pay the Lessors the sum of Ringgit Three hundred and six thousand six hundred and sixty six and cents sixty seven ($306,666.67) being rental for the first quarter on or before the 1st day of January, 1985."
[Sub-clause 4(8)].

The Trust Corporation made the necessary application to the High Court on December 14, 1984, and obtained its consent on January 2, 1985. It also made the necessary application to the Ruler-in-Council on January 5, 1985.

By a valuation reported December 6, 1984, prepared by C.H. Williams, Talhar & Wong Sdn. Bhd. (a firm of independent valuers agreed to by the parties) at the request of Rampai Muda, the annual market rental of the Hospital together with the said land and other buildings thereon was valued at $920,000/–. No rental has been paid by Rampai Muda since the takeover date January 1, 1985. Nor has it provided the bank guarantee or performance bond in the sum of $2.5 million.

By letter dated January 2, 1985 (V.5), the Trust Corporation through its solicitors asked Rampai Muda's solicitors to request Rampai Muda to pay *inter alia* the deposit and the rental for the first quarter of 1985 and to furnish a bank guarantee or performance bond in the sum of $2.5 million. There was no compliance by Rampai Muda and the Trust Corporation through its solicitors on February 14, 1985, wrote directly to Rampai Muda alleging breaches of the said agreement and demanding payment. This letter (V.6) reads:

*"BY HAND*

TC/lml/89964.8

14th February 1985.

Rampai Muda Development Sdn. Bhd.,
7th Floor, Bangunan Lian Seng,
Jalan Bukit Bintang,
*KUALA LUMPUR.*

Dear Sirs,

*PRIVATISATION OF THE LADY TEMPLER HOSPITAL*

We refer to the above matter.

Despite several reminders and requests to you to perform your obligations under the Takeover Agreement dated the 11th day of December 1984 you have failed still and/or neglected to perform any of your obligations under the said Agreement namely;

You have failed to make:

1. Payment of deposit of six (6) months rentals amounting to $460,000.00.

2. Payment of rent quarterly in advance amounting to $230,000.00.

3. Payment of Quit Rent for 1985 without which our application to the appropriate authority for approval to lease the land to you and for you to use the land as a private hospital will not be considered.

You have not provided a Bank Guarantee or Performance Bond to the value of $2,500,000.00 as security bond for due performance of the terms of the Agreement and the Lease.

Although you have offered to our clients two cheques amounting to $152,000.00 in payment of the purchase of stock from our clients one of the cheques has been issued by a third party. Our clients have requested for a covering letter enclosing the said cheques but to-date neither the letter nor the cheques have been delivered to our clients.

In view of the above breaches and/or any other breaches not specifically mentioned herein we have been instructed by our clients to inform you, which we hereby do, that if the above breaches are not remedied by the 25th day of February 1985 vacant possession of the Hospital must be delivered to our clients before the 31st day of March 1985.

Yours faithfully,

c.c.
1) M/s Yuen Tang & Co. (Attn: Mr. KingsleyYuen)
2) M/s Joseph Tan & Tang. (Ref: WL.hw. 629/84)
3) Y.B. Datuk K. Pathmanathan,
Ministry of Health Malaysia.
Jalan Cenderasai,
*KUALA LUMPUR.*
4) Datuk Wong Yoke Meng,
Ministry of Health Malaysia,
Jalan Cenderasai,
*KUALA LUMPUR.*
5) Tun Sir Henry H.S. Lee,
Development & Commercial Bank Bhd.,
Wisma On Tai, 23rd Floor,
Jalan Ampang,
*KUALA LUMPUR."*

As Rampai Muda did not make the payments referred to in V.6, the Trust Corporation then sent the letter dated February 27, 1985 (V.7), which reads:

"*URGENT-BY HAND*

TC/lml/89964.8

27th February 1985.

Rampai Muda Development Sdn. Bhd.,
7th Floor, Bangunan Lian Seng,
Jalan Bukit Bintang,
*KUALA LUMPUR.*

Dear Sirs,

*PRIVATISATION OF THE LADY TEMPLER HOSPITAL*

We refer to the above matter and to our letter of February 14, 1985.

As you have failed and/or neglected to remedy the breaches stipulated in our said letter within the stipulated time please note that possession of the Hospital is to be delivered to our clients on or before the 31st day of March 1985 failing which legal proceedings would be instituted without further reference thereto.

The following sums are due and payable to our clients:–

1. The sum of $230,000.00/- being payment of rental for the months of January to March 1985.

2. The sum of $152,000/- being payment of the purchase of stock from our clients.

Further you are to settle our bill of $40,932,.70 details of which have been forwarded to you through your solicitors on 25th February.

Kindly arrange for immediate payment of the above sums failing which legal proceedings would be instituted without further reference thereto.

We will make immediate application to the Court to set aside the Court Order obtained on January 2, 1985 and will write to the Land Registry to withdraw our application to lease the land to you and to change the land use from that of a tuberculosis hospital to a private hospital.

Yours faithfully,

c.c.
1) M/s Yuen Tang & Co. (Attn: Mr. Kingsley Yuen)
2) M/s Joseph Tan & Tang (Ref: WL.hw. 629/84)
3) Y.B. Datuk K. Pathmanathan
4) Datuk Wong Yoke Meng
5) Tan Sri Dato V.H. Hutson
Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered
6) Tun Sir Henry S.S. Lee
Vice-Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered."

Apparently on the same date that V.7 was written, the solicitors for Rampai Muda wrote the letter V.8 to the solicitors for the Trust Corporation in the following terms:

"Our Ref: WL.hw. 629.84
Your Ref: TC/lml/89964.8

February 27, 1985.

Messrs Skrine & Co.,
Straits Trading Building,
4 Leboh Pasar Besar,
*KUALA LUMPUR.*

Dear Sirs,

*PRIVATISATION OF THE LADY TEMPLER HOSPITAL*

We refer to your letter dated February 14, 1985.

We have been instructed to reply to your letter dated February 14, 1985 as follows:

(1) Our clients denies that payment of the deposit of six (6) months rental amounting to $640,000.00 is payable on the take-over date as alleged. Pursuant to Clause 4.1 of the Take-over Agreement ("Agreement") only rental is payable.

(2) Our client has reason to believe the valuation carried out by C.H. Williams Talhar & Wong Sdn. Bhd. on the amount of rental payable is incorrect. Our client proposes to request the said valuers to carry out a revaluation. Consequently our client shall withhold payment of rental.

(3) Our client is ready and willing to pay the quit rent for 1985 and enclose herewith UMBC Cheque No. 678077 for the sum of $772.50.

(4) Our client has completed the renovation of the Hospital and is of the opinion that the Hospital's operation is sufficient to cover the Hospital's expenditure. As such, our client is in the opinion that the Bank Guarantee/ Performance Bond is unnecessary pursuant to Clause 4.2(c) of the Agreement.

(5) Our client regrets the position adopted by your client in causing your letter of February 14, 1985 to be issued. In this respect our client refers your client to Clause 11 of the Agreement whereby it was agreed that the parties are to use their best endeavours to ensure that the Agreement would operate between the parties fairly and adequately.

(6) By reason of the matters aforesaid, our client denies that your client is entitled to vacant possession before March 31, 1985 and if necessary shall take all steps to resist any action by your client towards this end.

Strictly without prejudice to our client's rights, our client requests to have a meeting with your client on Friday, March 1, 1985 at 11.00 a.m. at Commonwealth House. At the said meeting, our client shall reply to each and every allegation made in your letter under reply and also to ensure a smooth and mutually satisfying completion of the Take-over Agreement.

Yours faithfully,

c.c.
1) Client
2) Y.B. Datuk K. Pathmanathan,
Ministry of Health Malaysia,
Jalan Cenderasai,
KUALA LUMPUR.
3) Datuk Wong Yoke Meng,
Ministry of Health Malaysia,
Jalan Cenderasai,
KUALA LUMPUR.
4) Tan Sri Datuk V.M. Hutson,
Chairman,
Board of Governors.
5) Tun Sir H.S. Lee,
Vice-Chairman,
Board of Governors.
6) Messrs Yuen Tang & Co."

Clause 11 of the said agreement referred to in the above letter reads:

"*MUTUAL INTENTION*

The parties hereto recognise and accept that it is impracticable to provide herein for every contingency that may arise in the course of the performance of the terms and conditions contained in this Agreement and the Lease and accordingly they hereby declare it to be their mutual intention that in all cases they shall each of them use their best endeavours so that this Agreement shall operate as between themselves fairly and equitably."

At the request of the Ministry of Health negotiations were entered into between the parties as evidenced by the letters V.9 to V.13 but the attempts at amicable settlement proved abortive. In the result the solicitors for the Trust Corporation wrote the letter dated March 11, 1986 (V.14), as follows:

"*BY HAND*

TC/lml/89964.8

11th March, 1986.

Rampai Muda Development Sdn. Bhd.,
7th Floor, Bangunan Lian Seng,
Jalan Bukit Bintang,
*55100 KUALA LUMPUR.*

Dear Sirs,

*PRIVATISATION OF THE LADY TEMPLER HOSPITAL*

We refer to the above matter.

Despite our notice to you dated 14th February 1985 requesting you to deliver vacant possession of the land held under Lease of State Land for Land Reserved for a Public Purpose No. 788, Lot 4433, Mukim of Kuala Lumpur to our clients on or before March 31, 1985 you are still occupying the said land as trespassers as a result of which you are liable to pay double rental with effect from April 1, 1985 in addition to the arrears of rental for the months of January, February and March 1985.

As far as rental is concerned todate you are liable to our clients for the sum of $2,070,000.00 made up as follows:—

| | |
|---|---|
| Rental for the months of January to March 1985 | $230,000.01 |
| Double rental for the months of April 1985 to March 1986 | $1,840,000.08 |
| | $2,070,000.09 |

Please make settlement of the said sum within fourteen (14) days of this letter failing which our clients would institute proceedings against you without further reference thereto.

You shall continue to be liable to pay double rental to our clients until the date of delivery of vacant possession of the said land by you. Our clients also reserve the right to institute action against you in respect of other damages suffered by our clients by reason of the breach of the Takeover Agreement by you.

We would also like to refer to the continued use of the name 'Lady Templer' for the Specialists' Centre. The Takeover Agreement has been terminated and you are now occupying the land as trespasser. We have been instructed to inform you that the name 'Lady Templer' is not available to be used by you for any purposes and that all necessary steps should be taken by you to desist from using the name in respect of any of your activities.

Yours faithfully,

c.c.
1) Tan Sri Vic Hutson, Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered.
2) Tun Sir Henry H.S. Lee, Vice-Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered.
3) Y.B. Datuk K. Pathmanaban.
4) M/s Yuen Tang & Co. (Attn: Mr. Kingsley Yuen)."

There was no compliance by Rampai Muda and the upshot was the filing of the action on July 17, 1986.

To put it in one sentence, the Trust Corporation's case in this action is that as a result of Rampai Muda committing a breach of the written agreement by not paying the rental and rental deposit and by not furnishing the bank guarantee/performance bond, and consequent upon sending the letter V.6, the said agreement has been terminated thus putting an end to the licence granted to Rampai Muda to occupy the Hospital, and, accordingly Rampai Muda has been occupying the said land and the Hospital as a trespasser since April 1, 1985 and must quit and deliver up vacant possession.

Rampai Muda has filed a defence and counterclaim and opposes this application. In its defence it denies that it has been in breach of the written agreement and says, *inter alia,* that it is not bound to pay any rentals or to furnish any bank guarantee/performance bond until approval is obtained for the leasing of the said land to it and for the conversion of the said Hospital into a private hospital under the provisions of the Private Hospitals Act, 1971. It also alleges that the valuation report by C.H. Williams was deliberately suppressed by the Trust Corporation at the time of the execution of the agreement and that the Trust Corporation is in breach of Clause 11 of the said agreement and that, in any event, the Trust Corporation has waived the notice of termination V.6. It also alleges the existence of a collateral agreement and counter-claims for specific performance of the said agreement, for general damages for breach of contract and for special damages for monies expended and for loss suffered in not being able to manage the said Hospital. It opposes this application on the ground that the action is frivolous, vexatious and/or an abuse of the process of the Court and that the Trust Corporation has not come to Court with clean hands in seeking an equitable remedy.

I shall now consider the principles that have to be applied where an application is made for a mandatory interlocutory injunction as in this case. The general principles applicable in any application for an interlocutory injunction have been discussed at length in the now familiar and classic case of *American Cyanamid Co.* v. *Ethicon Ltd.*[1] where Lord Diplock had this to say at page 509:

". . . [W]hen an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at the time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. . . . . The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he would not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

and at pages 510 and 511 :

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, *viz* abstaining from expressing any opinion upon the merits of the case until the hearing'

(*Wakefield* v. *Duke of Buccleuch* (1865) 12 L.T. 628 at 629). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

. . . . . . . . . . . . .

I would reiterate that, in addition to those which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

From the issues that have been raised in the defence as stated above especially with regard to the interpretation of the terms of the said agreement and to the question of waiver, there can be no doubt that there are serious questions to be tried in this action so that the first test laid down in the *American Cyanamid* case has been met. Both counsel contend that damages would not be adequate remedy to either of them in the event that the action is resolved in favour of the other. As the Trust Corporation is not a profit-making body and as its main concern is that the Hospital should function as a viable hospital, the loss or harm to the Trust Corporation, I do not think, can be measured in monetary terms. Counsel for the Trust Corporation has indicated that the Trust Corporation is prepared to give an undertaking in damages to Rampai Muda should the latter succeed at the trial and has proceeded to urge the Court to give prime consideration to the balance of convenience. I think this should be the correct approach in this case as local precedent shows. The general principles of the *American Cyanamid* case and three local authorities dealing with the issuance of interlocutory injunctions (*Gibb & Co.* v. *Malaysia Building Society Bhd.*[2] *Wah Loong (Jelapang) Tin Mine Sendirian Berhad* v. *Chia Ngen Yiok*[3] and *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.*[4]) were considered by the Federal Court (as it then was) in the case of *T.R. Hamzah & Yeang Sdn. Bhd.* v. *Lazar Sdn. Bhd.*[5] "Where an interlocutory injunction is sought" said Lee Hun Hoe C.J. (Borneo) in that case at page 55, "the balance of convenience will be the overriding consideration." The Chief Justice went on to say:

"*Halsbury's* Laws of England, 4th Edition, Volume 24, page 534, paragraph 948 states:

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted . . . .'.

The granting of a mandatory injunction is entirely discretionary. Every case must depend essentially upon its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly."

In other words before a Court decides to grant a mandatory interlocutory injunction in considering the balance of convenience exceptional circumstances must be shown to exist.

What are these circumstances which the Trust Corporation contends are so exceptional to warrant the issuance of a mandatory interlocutory injunction?

Counsel for the Trust Corporation says that these circumstances are clearly evidenced by, *inter alia*, the following facts which have not been contradicted by Rampai Muda, namely:

1) No licence has been issued to Rampai Muda under the Private Hospitals Act, 1971 to run the Hospital;

2) The admission by the present Managing Director of Rampai Muda that it has been unable to

seek external financing and that its internal resources are exhausted;

3) Rampai Muda has ceased running the Hospital since July 18, 1986, and the Hospital is presently being run and managed by a pro-tem committee comprising of staff members headed by a thoracic surgeon;

4) The staff of 213 people who are carrying on work at the Hospital have not been paid salaries by Rampai Muda since May 1986 and have indicated that they do not wish to continue working with Rampai Muda;

5) E.P.F. and S.O.C.S.O. contributions paid by employees to Rampai Muda have not been paid over and charges have been preferred against Rampai Muda at the instance of the E.P.F. Board;

6) Leasing rentals of equipment used by the Hospital have not been settled by Rampai Muda;

7) Electricity charges incurred by the Hospital have not been paid by Rampai Muda making it possible any moment and without notice for the electricity supply to the Hospital to be cut;

8) The Trust Corporation has advertised for new parties to take over the management of the Hospital and unless it is seen that Rampai Muda has been ordered by the Court to quit and deliver up vacant possession no new party will come forth and run the Hospital.

In opposing this application counsel for Rampai Muda has urged the Court to consider several factors, amongst them: the existence of the pre-contract documents for the purpose of explaining the terms and conditions of the said agreement; the very large sums of money which have been expended by Rampai Muda since taking possession of the Hospital in October 1984; the novelty of the said agreement relating to "privatisation" of the Hospital which could not provide for all eventualities; the failure on the part of the Trust Corporation to obtain the necessary approvals referred to in Clause 3 of the said agreement; the unusual provisions of Clause 4(1) of the said agreement relating to the payment of rental and other financial obligations during the period of licence; the payment of quit rent by Rampai Muda on August 14, 1985; the question of conflict of interest in the award of sub-contracts by the former Chairman of the Board of Directors of Rampai Muda and the alleged very close association between him and the Chairman of the Trust Corporation; the requests made by Rampai Muda to have meetings with the Trust Corporation to settle the dispute in the spirit of Clause 11 of the said agreement and the latter's refusal to do so; the reason for not providing the bank guarantee/performance bond; the reason for leaving the Hospital; and the credentials and credibility of the Hospital Administrator and of the General Secretary of the Lady Templer Hospital Staff Union.

I have considered all the points that have been made by counsel for Rampai Muda as to why the Court should not grant the orders as prayed for but, in my view, they relate to questions of fact which can only be resolved at the trial.

Counsel for Rampai Muda has also invoked the doctrine, "He who comes into equity must come with clean hands" and reverts to his contentions relating to the approvals not having been obtained, to alleged acquiescence on the part of the Trust Corporation in allowing Rampai Muda to continue running the Hospital, and to the allegations against the Chairman of the Trust Corporation as evidence that the Trust Corporation's conduct has not been clean and fair in seeking this application. I must say again that these are matters which can only be resolved at the trial.

The undisputed facts upon which counsel for the Trust Corporation has relied on to show exceptional circumstances, in my judgment, do tilt the balance of convenience in favour of the Trust Corporation's application as they in the main show that Rampai Muda is financially not at the present time in a position to run the Hospital. The Court also cannot ignore in this case, as the subject-matter is a hospital providing an essential social service, the plight of the patients who are undergoing treatment in the Hospital and of the hospital staff who have not been paid but who continue working dutifully, and also the interests of the public particularly the residents in the Cheras area who must be assured of on-going hospital facilities. In my view, these are special factors affecting the balance of convenience. For authority that the interests of the public should be taken into account I refer to *Smith* v. *Inner London Education Authority*[6] and *Tan Suan Choo* v. *Majlis Perbandaran Pulau Pinang*.[7] Finally, I would like to state that I have given full consideration to all the authorities and specifically to *Manchester Corporation* v. *Connolly and Others*[8] which counsel for Rampai Muda has cited for the proposition that no order for possession can be given by the Court unless a final judgment has been obtained. Although counsel for the

Trust Corporation has with some merit attempted to distinguish the facts of that case where leave was (but should not have been) given for a writ of possession to issue and the facts of this case where possession is asked for only until the trial of the action, in my judgment, the proposition of counsel for Rampai Muda is in the present circumstances academic in view of the uncontradicted fact that Rampai Muda has actually ceased running the Hospital since July 18, 1986, and has to all intents and purposes abandoned it whatever the reason. In view of all these considerations, I make an order in terms of all the prayers except that, because of the obvious typographical error in prayer (iii), the costs of this application will be paid by Rampai Muda to the Trust Corporation.

*Order accordingly.*

Solicitors: *Skrine & Co.; Syarikat Joginder Singh.*

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## *Re* HONG HUAT REALTY (M) SDN. BHD. UNITED ASIAN BANK BHD. v. HONG HUAT REALTY (M) SDN. BHD.

**[O.C.J. (Shankar J.) October 11, 1986]**

**[Johore Bahru – Companies Winding-up No. 42-41 of 1986]**

*Company Law – Winding-up – Petition by secured creditor – Company unable to pay debt – Commercial insolvency – Directors' personal guarantee – Company opposing petition – Grounds – Supporting creditors – Whether petition should be granted – Companies Act, 1965, s.218 – National Land Code, ss. 254 & 256(3).*

In this petition, the petitioner ("the Bank") seeks to wind-up the respondent company which was incorporated on February 14, 1972, with a paid up capital of $560,002. The company through its current account was granted by the Bank overdraft facilities secured by charges on 3 lots of land and a deposit of title deed on another lot. The Bank held a personal guarantee from each of the company's 3 directors and a fixed deposit from the company of $1.2 million. On March 26, 1982, the company's overdraft account was reduced from about $1.8 million to $544,639.56 by the application of the fixed deposit plus accrued interest of $1,256,523.23. The account became stagnant after that. By February 27, 1986, the amount owing to the Bank had swollen to $1,028,453.02 ("the debt").

On February 13, 1984, the Bank served a notice of default in respect of 2 of the lots of land, and invoked section 254 of the National Land Code, 1965, but the sale did not materialize. On April 1, 1986, the Bank issued the statutory notice in accordance with the provisions of the Companies Act, 1965, to the company for payment of the debt within 21 days. The debt was not paid, and the petition was filed and advertised, attracting the attention of the company's other creditors who gave notice of their intention to appear at the hearing which eventually took place on September 24, 1986.

The company was involved in 2 housing projects, the Saling Project and the Taman Nora Housing Project. It had charged Lot 1169, Mukim of Senai/Kulai to Asiavest Merchant Bankers (M) Bhd. for $2 million, and Lots 212 and 213, Mukim of Plentong, to the same chargee for $4 million. It would appear that these properties had been encumbered *in futuro* by way of an assignment and a charge in escrow in favour of Perwira Habib Bank (M) Bhd. for $11.5 million. After the petition was advertised, the law firm of Wong & Paramjothy, claiming to act for all the 537 purchasers in the 2 housing project, filed notice of its intention to appear on the petition, but it did not appear in court. A large number of the company's creditors supported the petition, which was opposed only by the company which advanced 3 grounds why the petition should be dismissed, *viz.* (a) the debt was disputed, (b) in these times of depressed economic circumstances and acute recession, the courts should no longer permit lenders a free hand in enforcing their legal remedies, and (c) to permit the petition to proceed would be to allow a multiplicity of proceedings which was tantamount to abuse of process.

**Held**, granting the petition: (1) there were no merits in the submissions made on behalf of the company;

(2) evidence of commercial and actual insolvency in this case was overwhelming;

(3) costs of the petitioning creditor and supporting creditors must be paid by the company.

*Cases referred to:*

(1) *Ng Ah Kway* v. *Tai Kit Enterprise Sdn. Bhd.* [1986] 1 M.L.J. 58.
(2) *Re Bryant Investment Co. Ltd.* [1974] 2 All E.R. 683.
(3) *Stonegate Securities Ltd.* v. *Gregory* [1980] 1 All E.R. 241.
(4) *NKM Development Sdn. Bhd.* v. *Irex Sdn. Bhd.* (1985) *Pillai* Sourcebook 2nd Ed. p. 1239.
(5) *F.J. Reddacliffe & Associates Pty. Ltd.* v. *Arc Engineering Pty. Ltd.* (1978) 3 A.C.L.R. 426.
(6) *Ng Yik Seng & Anor.* v. *Perwira Habib Bank (M) Bhd.* [1980] 2 M.L.J. 83.
(7) *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 M.L.J. 384.
(8) *Tengku Farid bin Tunku Hussain & Ors.* v. *United Asian Bank Bhd.* [1985] 2 M.L.J. 199.
(9) *Bank Bumiputra Malaysia Bhd.* v. *Esah binti Abdul Ghani* [1986] 1 M.L.J. 16.
(10) *Moor* v. *Anglo-Italian Bank* (1879) 10 Ch. D. 681.
(11) *Re Borough of Portsmouth Tramways Co.* [1892] 2 Ch. D. 362.
(12) *Malayan Plant (Pte) Ltd.* v. *Moscow Narodny Bank Ltd.* [1980] 2 M.L.J. 53, 54.
(13) *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413.